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IN THE

**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 1983

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No. ____

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UNITED GARMENT
MANUFACTURING COMPANY, LTD., *Petitioner,*

*v.*

TELINA NELSON, *a minor,* by CINDRA R. CARSON,
*Guardian ad Litem,* GERALD NELSON, SHERRY NELSON,
F. W. WOOLWORTH COMPANY and
TRAVELERS INSURANCE COMPANY, *Respondents.*

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*PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

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STAFFORD, ROSENBAUM, RIESER & HANSEN
RALPH WM. BUSHNELL
JEFFREY M. GALLAGHER
JOAN M. KNOEBEL
131 West Wilson Street
Suite 1200
P.O. Box 1784
Madison, Wisconsin 53701
(608) 256-0226

COUDERT BROTHERS
JERRY L. SIEGEL
RICHARD N. PAPPER
200 Park Avenue
New York, New York 10166

*Counsel for Petitioner, United Garment Manufacturing Company, Ltd.*

## QUESTIONS PRESENTED

1. Whether a district court of Wisconsin may, consistent with due process, exercise jurisdiction in a products liability action over a Hong Kong manufacturing company, whose sole contact with the United States was to manufacture shirts upon the request of another, unrelated Hong Kong company, and to unconditionally sell and deliver them in Hong Kong to that company, with the awareness that that company would resell the shirts to an international marketing conglomerate, whose distribution system includes, but is not limited to, the United States.

2. Whether the court of appeals improperly exercised appellate jurisdiction under the "pragmatic finality" test of *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964), over the district court orders dismissing two of five defendants for lack of personal jurisdiction where there was no request for or certification under 28 U.S.C. § 1292(b) and where the district court expressly declined to enter judgment under Federal Rules of Civil Prodecure 54(b).

## PARTIES TO THE PROCEEDING

The petitioner is United Garment Manufacturing Company, Ltd., one of the defendants in the district court. United Garment Manufacturing Company, Ltd. is a limited liability corporation which is incorporated under the laws of Hong Kong and which has no parent companies, no subsidiaries, and no affiliates. The respondents include the plaintiffs in the district court, Telina Nelson, a minor, by Cindra R. Carson, guardian ad litem, Gerald Nelson and Sherry Nelson, and the defendants F.W. Woolworth Company and its insurer, Travelers Insurance Company. Another defendant in the district court, Park Industries, Inc., was not a party to the appeal to the court of appeals. The final party in the district court was defendant Bunnan Tong & Company, Ltd. which has filed a separate petition for writ of certiorari to this Court.

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*PETITION FOR WRIT OF CERTIORARI TO THE*
*UNITED STATES COURT OF APPEALS*
*FOR THE SEVENTH CIRCUIT*

---

The petitioner, United Garment Manufacturing Company, Ltd., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on September 13, 1983. *

OPINIONS BELOW

The Appendix contains the opinions of the United States District Court for the Western District of Wisconsin, dated January 14, 1983, (Appendix A) and the Court of Appeals for the Seventh Circuit, dated April 7, 1983, (accepting jurisdiction) (Appendix B) and dated September 13, 1983, (deciding the merits of the appeal), (Appendix C) which are not yet reported.

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* Bunnan Tong & Company, Ltd. filed a separate petition for writ of certiorari from the same judgment on November 15, 1983. Dkt. No. 83-889.

## JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on September 13, 1983. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION

Jurisdiction was predicated upon the Wisconsin long arm statute, section 801.05(4)(b), Wis. Stats. (1981-2). The district court and the court of appeals held that the statute provided for personal jurisdiction to the full limits of the due process clause, and based their decisions on the due process clause.

## STATEMENT OF THE CASE

This is a diversity products liability action to recover for injuries allegedly suffered by the plaintiff when her cotton flannel shirt caught fire after contact with the flame of an allegedly defective butane cigarette lighter. Defendants are Park Industries, Inc., the manufacturer of the lighter, which was not a party to the appeal, and the several companies involved in the sale, distribution and production of the cotton flannel shirt: F.W. Woolworth Company ("Woolworth"), the worldwide retail conglomerate which sold plaintiff the shirt in a Wisconsin store; Travelers Insurance Company ("Travelers"), the insurer of Woolworth; Bunnan Tong & Company, Ltd. ("Bunnan Tong"), a Hong Kong company which, under a series of contracts spanning decades, acted as purchaser for Woolworth; and United Garment Manufacturing Company, Ltd. ("United Garment"), a Hong Kong company which manufactured the shirt.

The district court granted separate motions by United Garment and Bunnan Tong to dismiss the amended complaint and cross complaint of Woolworth and Travelers for lack of personal jurisdiction. The district court, in its decision and order of January 14, 1983, found that the sale of the shirts by United Garment to Bunnan Tong was not part of a purposeful effort by United Garment to serve the Wisconsin market. Rather, the court held that the shirts were sold to plaintiff in Wisconsin because of the purposeful and systematic efforts of Woolworth, and that United Garment's contacts with Wisconsin were insufficient to allow the exercise of jurisdiction.

Defendants Woolworth and Travelers moved the district court to direct the entry of a final judgment under Rule 54(b), Federal Rules of Civil Procedure, but the district court declined to do so. No party ever

asked the district court to certify its order dismissing United Garment for interlocutory review pursuant to 28 U.S.C. § 1292(b). Defendants Woolworth and Travelers, not the plaintiff, appealed the district court's non-final order to the Seventh Circuit Court of Appeals, which assumed jurisdiction under the "pragmatic finality" rule of *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964) and consolidated the appeal with an appeal from the district court's earlier order dismissing Bunnan Tong.

The court of appeals reversed the district court's orders dismissing the complaint against United Garment and Bunnan Tong for lack of personal jurisdiction. It held that, under *World-Wide Volkswagen Corp., et al. v. Woodson*, 444 U.S. 286 (1980), the district court erred in refusing to exercise jurisdiction because United Garment had placed its goods in the stream of commerce while aware that Woolworth would be the ultimate retail distributor and that Woolworth had retail stores throughout the world, including the United States.

In order to supply its worldwide system of retail stores, Woolworth, since World War II, had entered into a series of buying agreements with Bunnan Tong under which Bunnan Tong would select and purchase merchandise throughout the Orient for resale at a commission to Woolworth, which Woolworth in turn would resell in its stores throughout the world, including Canada, the United Kingdom, West Germany and the United States. Bunnan Tong representatives visited Woolworth in New York City from time to time in furtherance of this arrangement and Woolworth representatives visited Bunnan Tong in Hong Kong.

In 1976 Woolworth executed a purchase order with Bunnan Tong for 4,300 dozen printed cotton flannel shirts. Bunnan Tong selected and purchased the shirts in Hong Kong from United Garment, which delivered them to Bunnan Tong, F.O.B. Hong Kong. After receiving the shirts from United Garment in Hong Kong, Bunnan Tong shipped them to Woolworth in the United States for distribution by Woolworth to its American retail stores. United Garment had no role and had no contact whatsoever with Woolworth in this transaction.

United Garment has never had any contacts with the United States, let alone Wisconsin. It is not licensed to do business anywhere in the United States. It has no property, office, employees or agents here. It does no advertising here. No member or representative of the company has ever made a business trip or call to the United States to solicit or service business.

## REASONS FOR GRANTING THE WRIT

1. THE COURT OF APPEALS INCORRECTLY DECIDED ISSUES OF PERSONAL JURISDICTION IN THIS CASE WHICH HAVE NEVER BEEN ADDRESSED BY THIS COURT AND DID SO IN A MANNER WHICH CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS.

In this products liability action the court of appeals held that United States courts have jurisdiction over a foreign manufacturer which sold merchandise in a foreign country to a foreign middle marketer from whom an international retailer, independently and on its own initiative, purchased goods for resale in its own system of worldwide retail stores, including the United States. The decision of the court of appeals would permit state and federal courts in products liability actions to exercise judicial power over aliens who have literally no contacts whatsoever with the United States, let alone the forum state, other than that the agent of an international marketing giant approached them and bought their product to stock its retail shelves around the world. This decision is inconsistent with this Court's teachings in *World-Wide Volkswagen*, conflicts with holdings of other courts of appeals, and decides a question not yet addressed directly by this Court which has far reaching consequences for international trade.

This Court has not yet confronted the question of personal jurisdiction in a products liability case involving (a) the manufacturer of the goods, (b) an international distribution system initiated and dominated by a giant international conglomerate middle marketer, or (c) an alien defendant whose sole contact with the United States, let alone the forum state, was mere awareness of the giant marketer's retail system.

The principles which govern this case, and which the court of appeals failed to follow, are set forth in *World-Wide Volkswagen*. This Court held that a state court could not exercise personal jurisdiction under the stream of commerce theory over an automobile distributor and retailer doing business solely in another state on the basis of the fact that automobiles sold by these defendants to the plaintiff were driven by the plaintiff to the forum state where the accident occurred, even though such events were foreseeable. *World-Wide Volkswagen* stressed that courts must scrutinize the exact nature of the system of distribution—especially the part played by the foreign defendants over whom jurisdiction is asserted—and must evaluate those facts in light of the defendant's legitimate expectations, purposeful actions and right to a convenient forum, and with due consideration for the sovereignty of foreign jurisdictions. 444 U.S. at 291.

The decision below conflicts with *World-Wide Volkswagen* by

adopting the most extreme interpretation possible of the stream of commerce analysis. The Seventh Circuit totally failed to consider the nature of the distribution system in its analysis. The court of appeals simply held that, as a manufacturer, United Garment was at the top of the stream of commerce and therefore was more amenable to jurisdiction than distributors at the bottom of the stream. In so doing, the court ignored the uncontroverted fact that an international retailer initiated and dominated that system, and that the manufacturer, United Garment, had no control or participation whatsoever in the system of distribution. In fact, all United Garment did was sell the shirts in Hong Kong to another Hong Kong corporation. The court ignored the fact that is was the "unilateral activities" of Woolworth, the party asserting jurisdiction over United Garment on the appeal, and not the defendant, which caused the goods to be purchased and shipped to the United States and Wisconsin.

Instead, the court of appeals found jurisdiction solely on the basis of United Garment's "awareness" that the purchaser of its goods in Hong Kong would resell them to an international marketing conglomerate, which would resell them, among other places, in the United States. The court of appeals thus held in effect that United Garment submitted itself to jurisdiction in Wisconsin simply by not refusing to sell to another Hong Kong company in Hong Kong when informed that the goods would be resold to an international retailer who might market them in the United States. Such a sweeping holding is sure to chill the economic intercourse of foreign businesses which sell not only to American businesses, but to international business entities which have any distribution activities in the United States.

Other courts of appeals have decided the issue of jurisdiction over a foreign manufacturer in a products liability action, all contrary to the manner in which the Seventh Circuit decided this case. In all cases where jurisdiction was upheld, the foreign manufacturer–unlike United Garment—had an active, continuing interest, participation or control in a distribution system aimed directly at the United States market. The cases thus embody a rule which, unlike the decision below, effectuates this Court's analysis in *World-Wide Volkswagen*, in particular the clear direction that jurisdiction may be based only on conduct by which the defendant purposely avails itself of the privileges and benefits of the forum, and that contacts with the forum caused by unilateral activity of one asserting jurisdiction is insufficient. *See, e.g., Oswalt v. Scripto, Inc.*, 616 F.2d 191, 197, 199 (5th Cir. 1980) (an actual, express, negotiated, ongoing, exclusive United States distributorship agreement existed between the defendant Japanese manufacturer and defendant

American distributor involving millions of products); *Poyner v. Erma Werke GMBH*, 618 F.2d 1186, 1190-91 (6th Cir. 1980) *cert. denied* 449 U.S. 841 (defendant German manufacturer was a wholly-owned subsidiary of an American corporation which systematically and purposefully initiated and accomplished nation-wide American marketing through another exclusive distributorship agreement with an active American distributing company, and itself was "a strong backstage promotor of its products throughout the United States."); *Shanks v. Westland Equipment and Parts Company*, 668 F.2d 1165, 1167-68, (10th Cir. 1982) (defendant out-of-state manufacturer of truck trailers had a "sister" common carrier corporation which exclusively used defendant's trailers and regularly and necessarily did substantial business in the forum using defendant's trailers and repair parts); *Duple Motor Bodies Ltd. v. Hollingsworth*, 417 F.2d 231, 234-35 (9th Cir. 1969) (defendant British motorcoach manufacturer not only sold coaches to Hawaiian tour company but also visited Hawaii to determine specifications and modifications to the coaches, to service them, to negotiate with the tour company and to solicit further business directly); *Fisons Limited. v. United States*, 458 F.2d 1241, 1250-1 (7th Cir. 1972), *cert. denied*, 405 U.S. 1041 (1972) (British manufacturer had exclusive distributorship agreement with Illinois company and exercised continuing and significant control through licensing agreements over business activities of distributors in Illinois.)

Moreover, due process requires that courts respect the fundamental sovereignty of states, *World-Wide Volkswagen*, 444 U.S. at 286-7, and it does not minimize the sovereignty of the states to conclude that "foreign nations present a higher sovereignty barrier than that between two states within our union." *Insurance Company of North America v. Marina Salina Cruz*, 649 F.2d 1266, 1272 (9th Cir. 1981). The decision below totally ignores the fact that defendant is a Hong Kong, not an American, corporation which does business exclusively in Hong Kong. The decision in effect empowers any American or international company to force into any American forum a foreign business which it sought out on foreign soil and from whom it bought goods, by simply informing the foreign corporation that it might resell the products in the United States.

The decision below wholly ignores the due process requirements that the exercise of jurisdiction not impose an unfair burden on the nonresident defendant, *World-Wide Volkswagen, supra*, 444 U.S. at 292, and that courts consider the fairness and effectiveness of the result to all parties. *Id.* It would be fundamentally unfair to drag United Gar-

ment from Hong Kong into Wisconsin to defend itself in this case, which involves the manufacture of shirts in Hong Kong and a contract of sale entered into there with another Hong Kong corporation, all the evidence of which is in Hong Kong. The unfairness is particularly apparent since United Garment has never had any contacts with the United States, let alone Wisconsin.

The correct result was reached by the district court. Plaintiffs can get the full relief to which they are entitled from defendants Woolworth and Travelers, who are plainly within the district court's jurisdiction. Should Woolworth be found liable, it can return to Hong Kong and sue United Garment or Bunnan Tong there for indemnification or contribution, just as it was able over the years to travel to Hong Kong to search for merchandise and arrange for its purchase and shipment around the world to supply its system of worldwide retail stores.

2. THE COURT OF APPEALS' ACCEPTANCE OF APPELLATE JURISDICTION ABSENT A FINAL JUDGMENT OR CERTIFICATION BY THE DISTRICT COURT WAS TOTALLY IMPROPER, CONFLICTS WITH THE DECISIONS OF ALL OTHER COURTS OF APPEALS AND THREATENS TO DESTROY THE PRINCIPLE OF FINALITY UPON WHICH CONGRESS BASED APPELLATE JURISDICTION, THUS REQUIRING THIS COURT TO EXERCISE SUPERVISORY POWERS.

Congress has created an appellate jurisdiction which, pursuant to 28 U.S.C. § 1291, is limited to appeals from final decisions. The only exceptions to this principle are that certain interlocutory orders are appealable of right under 28 U.S.C. § 1292(a), others may be treated as final orders for purposes of establishing appellate jurisdiction upon motion to the district court pursuant to Rule 54(b) Federal Rule of Civil Procedure, and others are appealable as a matter of discretion first of the district and then the appellate court under 28 U.S.C. § 1292(b).

The district court's order dismissing United Garment for lack of personal jurisdiction was non-final because it "adjudicate[d] fewer than all the claims or the rights and liabilities of fewer than all of the parties. . ." Fed. R. Civ. P. 54(b). The district court declined to enter an order treating it as a final judgment under Rule 54(b), and was never asked to and did not certify the order under 28 U.S.C. § 1292(b).

Nonetheless, the court of appeals found appellate jurisdiction on the basis of the judicial exception of "pragmatic finality" set forth in *Gillespie v. United States Steel Corporation*, 379 U.S. 148 (1964), because it appeared to the court of appeals that "the costs to each party 'will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided.'" (App. 11)

The exercise of jurisdiction under these circumstances was unprecedented, without reason and in direct conflict with the decisions of every other circuit court. If the decision is permitted to stand, "section 1291 would be stripped of all significance." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477, n.30. (1978).

The *Gillespie* rule has never been used by an appellate court to exercise jurisdiction over an order dismissing some but not all parties for want of jurisdiction except in the unusual circumstance where, while a notice of appeal from the non-final dismissal order is pending, the remainder of the litigation in district court is literally terminated by some unrelated judicial action. Under these very limited and unusual circumstances, the entire proceeding before the district court effectively has been terminated, thereby eliminating any reason not to consider the pending appeal. *Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 184-85 (3d Cir. 1983); *Martin v. Campbell*, 692 F.2d 112, 114, (11th Cir. 1982); *Pireno v. New York State Chiropractic Ass'n*, 650 F.2d 387, 389, n.4, (2d Cir. 1981) *aff'd, Union Labor Life Insurance Co. v. Pireno*, ____U.S.____, 102 S.ct. 3002, 73 L.Ed.2d 647 (1982); *Anderson v. Allstate Insurance Co.*, 630 F.2d 677, 680-81, (9th Cir. 1980); *Tower v. Moss*, 625 F.2d 1161, 1164-65, (5th Cir. 1980); *Jetco Electronic Industries, Inc. v. Gardiner*, 473 F.2d 1228, 1231, (5th Cir. 1973); *Frankfort Oil Company v. W.F. Snakard*, 279 F.2d 436, 438, (10th Cir. 1960), *cert. denied*, 364 U.S. 920 (1960).

That unusual circumstance is not present in this case. Where, as here, an order dismissing some but not all defendants for lack of personal jurisdiction alone is appealed from, the courts of appeals unanimously have held the order to be non-final and have denied appellate jurisdiction other than through Rule 54(b) or section 1292(b). *Coulter v. Sears, Roebuck and Co.*, 411 F.2d 1189 (5th Cir. 1969) *(per curiam); Peralta v. Quad Tool and Dye Supply Co.*, 370 F.2d 103, 105 (3d Cir. 1966); *Partin v. Hassan Motors, Inc.*, 363 F.2d 104,105 (6th Cir. 1966) *(per curiam); Schnur & Cohan, Inc. v. McDonald*, 328 F.2d 103, 104-5 (4th Cir. 1964); *Norte & Co. v. Defiance Industries, Inc.*, 319 F.2d 336, 337 (2d Cir. 1963). *See also, Golden Villa Spa, Inc. v. Health Industries, Inc.*, 549 F.2d 1363, 1364 (10th Cir. 1977) *(per curiam); Lane v. Graves*, 518 F.2d 965 (8th Cir. 1975) *(per curiam); Licek Potato Chip Co. v. Fair*, 599 F.2d 181, 184-85, (7th Cir. 1979).

The decision below not only conflicts with other circuits' interpretations of the finality rule in cases where some, but not all, parties have been dismissed. It also invites, in violation of the plain mandate of Rule 54(b), appeals from the innumerable decisions district courts make

dismissing one or more, but not all, parties from an action for want of jurisdiction or for any other reason. If allowed to stand, the decision thus threatens to undermine completely the finality rule which underlies federal appellate jurisdiction.

## CONCLUSION

For these reasons, a writ of certiorari should be issued to review the judgment of the Court of Appeals for the Seventh Circuit.

Date: December 8, 1983.


Stafford, Rosenbaum, Rieser & Hansen
Ralph Wm. Bushnell
Jeffrey M. Gallagher
Joan M. Knoebel
131 West Wilson Street
Suite 1200
P.O. Box 1784
Madison, Wisconsin 53701
(608) 256-0226

Coudert Brothers
Jerry L. Siegel
Richard N. Papper
200 Park Avenue
New York, New York 10166

*Counsel for Petitioner, United Garment Manufacturing Company, Ltd.*

In the
UNITED STATES DISTRICT COURT
For the Western District of Wisconsin

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Memorandum and Order 81-C-643

TELINA NELSON, *a minor,* by CINDRA R. CARSON,
*Guardian ad Litem,* GERALD NELSON and
SHERRY NELSON, *Plaintiffs,*

*v.*

F.W. WOOLWORTH COMPANY, a foreign corporation,
TRAVELERS INSURANCE COMPANY, a foreign corporation,
PARK INDUSTRIES,INC., a foreign corporation,
BUNNAN TONG AND COMPANY, LTD., a foreign corporation,
UNITED GARMENT MANUFACTURING COMPANY, LTD.,
a foreign corporation, and ABC CORPORATION, *Defendants.*

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On September 16, 1982, this Court granted the motion of Bunnan Tong and Company, Ltd. to dismiss. The Court held that Bunnan Tong lacked sufficient contacts with the State of Wisconsin to subject it to suit in this District.

United Garment Manufacturing Company, Ltd. (United) has filed a motion to dismiss, alleging grounds similar to those relief [sic] upon by Bunnan Tong. The motion is granted.

FACTS

The following allegations, among others, appear in the affidavit of Peter Choi, a director of United since 1976:

1. United was organized as a limited liability company in Hong Kong in 1957 and is presently duly incorporated under the laws of Hong Kong. United manufactures textile products in Hong Kong.

2. United is not licensed and has never been licensed to do business in the State of Wisconsin or elsewhere in the United States.

3. United does not own and has never owned any real or personal property within the State of Wisconsin or elsewhere in the United States.

4. United does not employ and has never employed any individuals within the State of Wisconsin or elsewhere in the United States.

5. United does not maintain and has never maintained any office in the State of Wisconsin or elsewhere in the United States.

6. The Company has never had any agents, representatives, employees, sales persons or distributors in the State of Wisconsin or elsewhere in the United States.

7. Neither United nor any representative of United has ever made any business trips or calls to anyone in the State of Wisconsin or elsewhere in the United States.

8. United has never had any advertising done on its behalf to solicit business in the State of Wisconsin or elsewhere in the United States.

9. Neither F.W. Woolworth Company nor Bunnan Tong and Company, Ltd. (Bunnan Tong) is now nor ever has been United's agent or representative in the State of Wisconsin or elsewhere in the United States.

10. United has never serviced any products in the State of Wisconsin or elsewhere in the United States.

11. United sold certain "Topsall" shirts to Bunnan Tong in Hong Kong with deliveries to Bunnan Tong in Hong Kong in early 1977. Other than these deliveries, United has never sold "Topsall" shirts.

12. Thereafter, United had nothing further to do with or further interest in the "Topsall" shirts sold to Bunnan Tong.

13. United has never received any direct benefit or protection as a result of the laws of the State of Wisconsin in the course of its business.

14. United has never been involved in a suit in the State of Wisconsin, either as a plaintiff or a defendant, or submitted to the jurisdiction of Wisconsin courts.

15. There was no service of summons upon United within the State of Wisconsin.

16. United received the summons and complaint in this action in Hong Kong.

The following allegations, among others, appear in the affidavit of Charles W. Turner, buyer of men's shirts for defendant F.W. Woolworth Company (Woolworth):

17. For a period of approximately four to five years, from 1973

through 1977, United was the exclusive manufacturer of all 100% cotton flannel boy's shirts purchased by F.W. Woolworth Company through its broker and importer, Bunnan Tong & Company, Ltd.

18. During this four to five year period, Mr. Turner visited United's premises in Hong Kong at least once each year. On these visits, he had personal dealings with the owner of United, and with one of the directors, Peter Choy For Wing.

19. United manufactured boy's 100% cotton flannel shirts specifically for Woolworths during those years under the "Topsall" label. "Topsall" was Woolworth's label during those years, and United had full knowledge of this fact. In fact, United manufactured the "Topsall" label on Woolworth shirts for Woolworth.

20. Peter Choy For Wing was fully aware that the shirts United manufactured under the "Topsall" label for Woolworth would be imported into the United States and sold at Woolworth retail outlets throughout the United States.

21. During the years when United manufactured shirts under the "Topsall" label for Woolworth, United also manufactured shirts under labels for other American distributors and retailers, including specifically, Men's Wear International, a division of Van Heusen, and Montgomery Ward.

22. Because of the nature of the labor market in the textile industry, for at least the last 10 years, 85% to 90% of all printed cotton flannel shirts sold in the United States have been manufactured outside of the United States.[1].

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[1] The affidavits appear to disagree about some of the facts pertinent to this motion. Specifically, Mr. Choi implies that United's only contact with "Topsall" shirts was in early 1977 (¶11, 12), while Mr. Turner alleges that United manufactured "Topsall" shirts during a four or five year period ending in 1977 (¶17,19). The Court will not attempt to clarify this discrepancy, merely accepting the version of the events most favorable to the parties opposing United's motion to dismiss.

In granting the motion of defendant Bunnan Tong & Company, Ltd. to dismiss, the Court relied upon *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). In *World-Wide*, plaintiffs purchased an automobile in New York. They drove the vehicle to Oklahoma, where a serious accident occurred, resulting in injury to the car's occupants. [2] Plaintiffs filed a products-liability action against the car's manufacturer, importer, regional distributor, and retail dealer. The latter two defendants contested their amenability to suit in Oklahoma. *Id.* at 288.

The Supreme Court held that the trial court may not exercise jurisdiction over the distributor and dealer, finding that these defendants lacked the requisite "minimum contacts" with Oklahoma which are required by the Due Process Clause. The Court wrote:

> *[W]e find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. Petitioners carry on no activity whatsoever in Oklahoma. They close no sales and perform no services there. They avail themselves of none of the privileges and benefits of Oklahoma law. They solicit no business there either through salespersons or through advertising reasonably calculated to reach the State. Nor does the record show that they regularly sell cars at wholesale or retail to Oklahoma customers or residents or that they indirectly, through others, serve or seek to serve the Oklahoma market. In short, respondents seek to base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom; the fortuitous circumstance that a single Audi automobile, sold in New York to New York residents, happened to suffer an accident while passing through Oklahoma.*

*Id.* at 295.

In this case, the affidavits demonstrate a similar lack of contact with Wisconsin.

Plaintiffs argue, however, that United sold shirts to Bunnan Tong, which in turn sold them to Woolworth, which in turn distributed the shirts in the United States. Therefore, because at least one of these shirts found its way to Wisconsin and was purchased by plaintiffs, United

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[2] Ironically, plaintiffs in *World-Wide* alleged severe burns resulting from the accident. *Id.* at 288. Alleged severe burns form the basis of the instant case as well.

should have been able to "foresee" that it may be subject to suit in Wisconsin. *World-Wide*, however, restricted severely the relevance of foreseeability in due process analysis:

> *This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.*

*Id.* at 297 (cities omitted). Thus *World-Wide* instructs the Court only to examine the contacts between United and the forum state. In this case, these contacts are insufficient to bring United to Wisconsin to defend this action.

Plaintiffs also argue that *World-Wide* should be distinguished from the present case because *World-Wide* did not address the "precise issue" of the amenability to suit of a manufacturer. The Court believes, however, that *World-Wide* is not limited to distributors and dealers.

Plaintiffs also rely upon this language in *World-Wide:*

> *Hence if the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Cf.* Gray v. American Radiator & Standard Sanitar Corp., *22 Ill. 2d 432, 176 N. E. 2d 761 (1961).*

*Id.* at 297-298. In this case, however, the affidavits indicate that United did not distribute its products to Wisconsin or even to the United States. Instead, United sold the shirts to Bunnan Tong, which in turn sold them to Woolworth. Woolworth then distributed the shirts in various jurisdictions in the United States. Mr. Turner's affidavit shows that United was possibly aware of this scheme of distribution. United did not, however, "deliver its products into the stream of commerce." Instead, Woolworth traveled to Hong Kong to purchase shirts, which Woolworth imported to the United States, distributed and sold. United also had no knowledge or expectation that Wisconsin consumers

would purchase its shirts.

*Schwilm v. Holbrook*, 661 F.2d 12 (3d Cir. 1981) and *Shanks v. Westland Equipment and Parts Co.*, 668 F.2d 1165 (10th Cir. 1982), cited in plaintiff's brief, do not alter the result here. In *Schwilm*, plaintiff sued for medical malpractice in a Pennsylvania court. Although the Court of Appeals discusses *World-Wide*, its discourse is strictly dicta: "We need not determine whether Dr. Holbrook is in fact amenable to jurisdiction in Pennsylvania because we hold West Virginia the more appropriate forum." 661 F.2d at 15.

In *Shanks*, plaintiff truck driver sued a manufacturer for alleged negligent design and manufacture of a trailer. Citing *World-Wide*, the District Court dismissed, holding that defendant lacked sufficient contacts with the State of Wyoming. The Court of Appeals reversed, finding that defendant supplied many trailers to a Wyoming-based company that employed plaintiff. The Court of Appeals also noted that defendant and the employer were related companies, owned by the same family. 668 F.2d at 1167.

In the present case, plaintiffs have alleged no such relationship between United and any other defendant. Mr. Turner's affidavit is insufficient to establish the close connection between Woolworth and United that would permit this Court to exercise personal jurisdiction under the reasoning relied upon in *Shanks*.

Woolworth and Travelers Insurance Company (Travelers), in their brief in opposition to United's motion to dismiss, argue that the present case should be distinguished from *World-Wide* because *World-Wide* presented an issue of federalism and interstate relations. In this case, United is a Hong Kong corporation. The Court does not find the distinction compelling in this case. *World-Wide was not solely concerned with relations among states:*

> *As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist "minimum contacts" between the defendant and the forum State. (cite omitted). The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.*

444 U.S. at 291-292. Thus, the fairness of subjecting to suit in a distant

jurisdiction must be the primary consideration in determining whether United may be sued in Wisconsin.

Contrary to the suggestion of Woolworth and Travelers, application of *World-Wide* to United will not "amputate" long-arm jurisdiction. Where a plaintiff can show that a foreign corporation "purposefully avail[ed] itself of the privilege of conducting activities within the forum State," *Hanson v. Denckla*, 357 U.S. 235, 253 (1958), a showing not made in this case, the long-arm statute may compel a foreign corporation to defend in Wisconsin. Further, plaintiffs are not without a remedy. They may sue the retailer, Woolworth, a major department store that presumably has the assets or insurance to fully cover any judgment. If, after a judgment, Woolworth believes that United (or Bunnan Tong) should be held accountable, the Court finds nothing unfair about requiring Woolworth to return to Hong Kong to seek contribution. If Woolworth can travel to Hong Kong to buy shirts for import, distribution, and sale in this country, it can return to the same locale to seek redress from the manufacturer.

ORDER

IT IS ORDERED that the motion of defendant United Garment Manufacturing Company, Ltd. to dismiss is GRANTED.

Entered this 14th day of January, 1983.

BY THE COURT:

JOHN C. SHABAZ
*District Judge*

APPENDIX B

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604
APRIL 7, 1983

Before
HON. WALTER J. CUMMINGS, Chief Judge

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Nos. 82-2631 and 83-1270

TELINA NELSON, *a minor*, by CINDRA R. CARSON,
*Guardian ad Litem, et al., Plaintiffs-Appellees*

*v.*

F. W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY,
*Defendants-Appellants,*

*and*

BUNNAN TONG & COMPANY, LTD., and UNITED GARMENT MANUFACTURING COMPANY, LTD., *Defendants-Appellees.*

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Appeals from the United States District Court for the
Western District of Wisconsin.
No. 81-C-643—**John C. Shabaz**, *Judge.*

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The Court has considered the following documents:

1. The "NOTICE OF MOTION AND MOTION TO STRIKE THE NOTICE OF APPEAL AND DISMISS THE APPEAL OF F.W. WOOLWORTH COMPANY" filed herein on February 18, 1983, by counsel for United Garment Manufacturing Company, Ltd.

2. The "BUNNAN TONG & COMPANY, LTD.'S STATEMENT OF POSITION" filed herein on February 22, 1983.

3. The "MOTION FOR STAY OF PROCEEDINGS IN THE DISTRICT COURT AND FOR CONSOLIDATION OF APPEALS" filed herein on February 23, 1983, by counsel for the defendants-appellants.

4. The "BRIEF OF DEFENDANTS-APPELLANTS, F.W. WOOLWORTH CO. and THE TRAVELERS INSURANCE COMPANY, IN SUPPORT OF MOTION TO STAY" filed herein on February 23, 1983.

5. The "STATEMENT OF POSITION Pursuant to Order of U.S. Court of Appeals Dated 02/09/83" filed herein on February 23, 1983, by counsel for the plaintiffs.

6. The "SHORT STATEMENT OF DEFENDANTS-APPELLANTS, F.W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY, REGARDING THE RELATIVE DISPOSITION OF THE APPEALS AND THE APRIL 25, 1983 TRIAL DATE" filed herein on February 23, 1983.

7. The "BRIEF OF DEFENDANTS-APPELLANTS, F.W. WOOLWORTH CO. and THE TRAVELERS INSURANCE COMPANY, IN SUPPORT OF MOTION TO STAY" filed herein on February 23, 1983.

8. The "NOTICE OF MOTION AND MOTION TO STRIKE THE NOTICE OF APPEAL AND DISMISS THE APPEAL OF F.W. WOOLWORTH COMPANY AND TRAVELERS INSURANCE COMPANY IN APPEAL NO. 82-2631" filed herein on March 3, 1983, by counsel for Bunnan Tong and Company, Ltd.

9. The "BRIEF OF DEFENDANTS-APPELLANTS F.W. WOOLWORTH CO. AND TRAVELERS INSURANCE COMPANY IN OPPOSITION TO DEFENDANTS-APPELLEES UNITED GARMENT AND BUNNAN TONG'S MOTIONS TO DISMISS THE APPEALS" filed herein on March 3, 1983.

10. The "RESPONSE TO MOTION FOR STAY OF PROCEEDINGS IN THE DISTRICT COURT AND FOR CONSOLIDATION OF APPEALS" filed herein on March 7, 1983, by counsel for the plaintiffs-appellees.

11. The "BRIEF OF DEFENDANT-APPELLEE BUNNAN TONG & COMPANY IN OPPOSITION TO APPELLANTS' MOTION TO STAY" filed herein on March 7, 1983.

12. The "RESPONSE TO NOTICE OF MOTION AND MOTION TO STRIKE THE NOTICE OF APPEAL AND DISMISS THE APPEAL OF F.W. WOOLWORTH COMPANY" filed herein on March 7, 1983, by counsel for the plaintiffs-appellees.

13. The "APPELLEE'S REPLY TO RESPONSE OF APPELLANTS REGARDING JURISDICTION OVER APPEAL" filed herein on March 9, 1983.

14. The "BUNNAN TONG'S REPLY TO RESPONSE OF APPELLANTS REGARDING JURISDICTION OVER APPEAL" filed herein on March 14, 1983.

The documents filed in this case generally address whether this Court has jurisdiction to resolve these consolidated appeals. There are two orders for which appellate review is sought:

(1) The district court order of January 4, 1983, dismissing defendant United Garment Manufacturing Company; and

(2) The district court order of September 16, 1982, dismissing defendant Bunnan Tong and Company.

Defendants-appellants F.W. Woolworth Company and Travelers Insurance Company urge this Court to stay the district court trial currently scheduled for April 25, 1983, pending resolution of the jurisdictional issue on appeal. Appellants maintain that the requirements for finality under 28 U.S.C. § 1291, thereby vesting this Court with appellate jurisdiction, are satisfied based on the Supreme Court's decision in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

Defendants-appellees United Garment Manufacturing Company, Ltd. and Bunnan Tong & Company, Ltd. have moved to dismiss these consolidated appeals and oppose a stay of the district court proceedings. In support of their position, appellees contend that the district court orders are interlocutory and not appealable. Further, they allege that this Court lacks appellate jurisdiction in view of the district court's determination not to certify the dismissal order pursuant to Rule 54(b) and the lack of certification under 28 U.S.C. § 1292(b).

Appellees are correct in asserting that technical certification is

lacking under either Rule 54(b) or 28 U.S.C. § 1292(b). We choose to adopt instead, however, the analysis set forth in the Supreme Court's decision in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964) and suggested by appellants. In *Gillespie*, the Court upheld the decision by a court of appeals to review a district court order that did not satisfy the technical requirements of finality. It reasoned that the "requirement of finality is to be given a 'practical rather than a technical construction,' " (quoting *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). To arrive at its decision, the Court applied a balancing test whereby the competing considerations of inconvenience and costs of piecemeal review were weighed against the danger of denying justice by delay. *Id.* at 153.

In the present case, we are convinced justice is best promoted by appellate review of the district court orders before the trial set for April 25, 1983. If we declined jurisdiction at this point, the parties would be compelled to go to trial with the jurisdictional questions unanswered. *Id.* Because two critical parties in the chain of distribution were dismissed by the district court, it seems clear that the costs to each party "will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided." *Id.* Accordingly, the "Motion for Stay of Proceedings in the District Court and for Consolidation of Appeals" is GRANTED until further order of the Court. The "Motion to Strike the Notice of Appeal and Dismiss the Appeal of F.W. Woolworth Company" and the "Motion to Strike the Notice of Appeal of F.W. Woolworth Company and Travelers Insurance Company in Appeal No. 82-2631" are DENIED.

These cases are CONSOLIDATED for the purposes of briefing and decision, and the following briefing schedule shall apply:

1. Defendants-appellants, F.W. Woolworth, et al., shall file their brief and required short appendix with this Court on or before April 28, 1983.
2. Plaintiffs-appellees, Telina Nelson, et al., shall file their appellees' brief and required short appendix on or before May 19, 1983.
3. Defendants-appellees, Bunnan Tong & Company, Ltd., and United Garment Manufacturing Company, Ltd., shall file their consolidated appellees' brief and required short appendix on or before May 19, 1983.
4. Defendants-appellants, F.W. Woolworth, et al., shall file their reply brief, if any, on or before May 26, 1983.

The Court will attempt to set these cases for oral argument during the first two weeks of June, 1983.

APPENDIX C

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

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Nos. 82-2631 and 83-1270

TELINA NELSON, *a minor*, by CINDRA R. CARSON, *Guardian ad Litem*, GERALD NELSON, and SHERRY NELSON, *Plaintiffs*

*v.*

PARK INDUSTRIES, INC., *Defendant*,

F. W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY,

*Defendants-Appellants*,

*and*

BUNNAN TONG & COMPANY, LTD., and UNITED GARMENT MANUFACTURING COMPANY, LTD., *Defendants-Appellees*.

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Appeal from the United States District Court for the Western District of Wisconsin.
No. 81 C 643 - John C. Shabaz, *Judge*.

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ARGUED JUNE 6, 1983—DECIDED SPETEMBER 13, 1983

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Before BAUER and FLAUM, *Circuit Judges*, and FAIRCHILD, *Senior Circuit Judge*.

FLAUM, *Circuit Judge*. This appeal challenges two dismissal orders entered by the district court. In separate orders, the district court determined that it lacked personal jurisdiction over defendants Bunnan Tong & Company ("Bunnan") and United Grament Manufacturing Company ("United"). For the reasons stated below, we reverse both orders.

This diversity action is a products liability case in which the minor plaintiff seeks recovery for severe burns sustained when the cotton flannel shirt she was wearing ignited after contact with the flame from a butane cigarette lighter.[1] The amended complaint ("complaint") names the following parties as defendants: F.W. Woolworth Company ("Woolworth"), the retail seller of the flannel shirt; Travelers Insurance Company ("Travelers"), Woolworth's insurer; Bunnan, Woolworth's purchasing agent for the flannel shirt; and United, the manufacturer of the flannel shirt.[2] The complaint states four causes of action, alleging both negligence and strict liability theories against the defendants.

Bunnan moved to dismiss the complaint against it pursuant to Fed. R. Civ. P. 12(b)(2) for lack of personal jurisdiction. In a brief order, the district court found that Bunnan has no contacts or relations with the State of Wisconsin and that there was no more than a mere likelihood that the flannel shirt supplied by Woolworth would find its way into Wisconsin. The court concluded therefore that the decision in *World-Wide Volkswagen Corp. v. Woodson ("World-Wide Volkswagen")*, 444 U.S. 286 (1980), is controlling and it granted Bunnan's motion.[3] United then made a similar motion to dismiss. In a memorandum opinion and order, the district court again found *World-wide Volkswagen* controlling and it granted United's motion to dismiss. Plaintiffs and Woolworth appeal from these two dismissal orders.

To determine whether exercising personal jurisdiction is proper, a court may receive and weigh affidavits prior to trial on the merits. *O'Hare International Bank v. Hampton*, 437 F.2d 1173, 1176 (7th Cir. 1971). During this preliminary proceeding, although the burden of proof rests on the party asserting jurisdiction, if the district court's deci-

[1] In one cause of action, the minor plaintiff's parents also seek recovery for certain medical expenses incurred and for the deprivation of society and companionship of their daughter.

[2] The complaint also names "ABC Corporation," which is a fictitious name for the unknown manufacturer of the fabric used for the flannel shirt.

[3] Woolworth's and Travelers' motion to reconsider this order was denied.

sion is based on the submission of written materials the burden of proof is met by a prima facie showing that personal jurisdiction is conferred under the relevant jurisdictional statute. *ID.; see also Neiman v. Rudolf Wolff & Co.*, 619 F.2d 1189, 1190 (7th Cir.), *cert. denied*, 449 U.S. 920 (1980). Further, the party asserting jurisdiction is entitled to the resolution in its favor of all disputes concerning relevant facts presented in the record. *Id.* Applying these standards, the following facts underlie this appeal.

United and Bunnan are both foreign corporations and neither company has ever had any physical presence in the State of Wisconsin. United is incorporated under the laws of Hong Kong and it is in the business of manufacturing textile products in Hong Kong. From 1973 to 1977, United manufactured all of the 100% cotton flannel boys shirts ("flannel shirts") purchased by Woolworth for resale in the United States. There was, however, no direct commercial relationship between United and Woolworth. Rather, Woolworth retained the services of Bunnan, which is also a company incorporated under the laws of Hong Kong. Bunnan is an exporter and agent for foreign buyers of general merchandise, including textile products manufactured in Hong Kong and other Southeast Asian countries. Bunnan and Woolworth have had a business relationship since the end of World War II. This relationship has consisted of a series of buying agreements in which Bunnan agrees to act as a buying representative for Woolworth. The services Bunnan performs in that capacity include buying product samples, placing purchase contracts, inspecting products before shipment to Woolworth, acting as Woolworth's representative in efforts to obtain reimbursement from a manufacturer for defective merchandise, and holding Woolworth harmless from certain claims made against Woolworth involving the merchandise purchased by Woolworth through Bunnan.

The flannel shirt worn by the minor plaintiff in this case was manufactured by United in Hong Kong, purchased on behalf of Woolworth by Bunnan in Hong Kong, and sold at a Woolworth retail store by Woolworth in Wisconsin. The shirt was one from a purchase order placed by Woolworth with Bunnan in October 1976 for 4,300 dozen flannel shirts. Bunnan filled this purchase order with shirts manufactured by United. The shirts were packaged at United's factory with a label bearing the brand name "Topsall." Those labels were manufactured and placed on the shirts by United. Bunnan purchased the shirts

from United "F.O.B. Hong Kong." The shirts were delivered by Bunnan to a shipper in Hong Kong which had been selected by Woolworth. This shipper then arranged the transportation of the shirts from Hong Kong to New York, Boston, Philadelphia, San Francisco and Los Angeles at Woolworth's expense. Several of these shirts eventually were displayed in a Woolworth retail store in Wisconsin and one was purchased for the minor plaintiff in this case.

A federal court has personal jurisdiction over the parties in a diversity action only if a court in the state in which the federal court is sitting would have jurisdiction. *Lakeside Bridge & Steel Co. v. Mountain State Constr. Co.*, 597 F.2d 596, 598 (7th Cir. 1979). In addition, Fed. R. Civ. P. 4(e) requires that if no federal statute provides for the manner of service, service is governed by the law of the state in which the district court sits. The applicable statute in this case is Wisconsin's long arm statute, Wis. Stat. § 801.05 (1981-82). That section provides for personal jurisdiction over an out-of-state defendant

> *[i]n any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, providing in addition that at the time of the injury . . . [p]roducts, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.*

Wis. Stat. § 801.05(4)(b) (1981-82). There are constitutional limits, however, on the reach of this long arm statute. These limits, most recently described by the Supreme Court in *World-Wide Volkswagen*, 444 U.S. at 291-94, were relied on by the district court in dismissing United and Bunnan.

Beginning our analysis with the long arm statute, there is no question in this case that United is subject to suit under the language of that statute. United manufactured flannel shirts in Hong Kong and the one allegedly causing injury was purchased and used in Wisconsin. Bunnan, however, argues for the first time on appeal that its alleged actions in this lawsuit do not come within the purview of the long arms statute. Specifically, Bunnan submits that the complaint does not allege that Bunnan "processed, serviced or manufactured" the flannel shirt at issue here. In addition, Bunnan contends that it did nothing to prepare any of the shirts for sale. We are not persuaded by Bunnan's technical pleading argument or its narrow reading of the long arm statute. Federal Rule of

Civil Procedure 8(a)(1) requires only a short and plain statement of the grounds upon which jurisdiction depends, not a verbatim repetition of the language of the long arm statute. The complaint alleges that Bunnan is in the business of selling and/or distributing children's clothing for resale to the public and specifically that Bunnan distributed to Woolworth certain flannel shirts, one of which ultimately was purchased in Wisconsin for the minor plaintiff. These allegations are sufficient to meet the pleading requirements if the conduct described falls within the scope of the long arm statute. In this regard, the parties and court have not located any case law interpreting the phrase "processed, serviced or manufactured."[4] As a general principle though, the Wisconsin Supreme Court has determined that the long arm statute should "be given a liberal construction in favor of the exercise of jurisdiction." *Stevens v. White Motor Corp., 77 Wis. 2d 64, 74, 252 N.W. 2d 88, 93 (1977). Under such a liberal construction, we conclude that the word "processed" should be interpreted to include a distributor's purchase and sale of goods in the normal course of the distribution of those goods.*[5] *Therefore, both Bunnan and United are subject to suit under the long arm statute, unless the exercise of jurisdiction over them would be inconsistent with due process.*

*The due process question raised here requires an interpretation and application of the holding and certain dictum in World-Wide Volkswagen* concerning the stream of commerce theory of personal

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[4] The Wisconsin Supreme Court has determined that the shipment from out of state of a pet dog as a gift did not constitute "products, materials or things processed, serviced or manufactured by the defendant" as set forth in Wis. Stat. 801.05(4)(b) (198-82). *Lincoln v. Seawright,* 104 Wis. 2d 4, 310 N.W.2d 596 (1981). The court acknowledged that the long arm statute should be liberally construed, but it also noted that the statute could not be ignored. The court's analysis, however, did not require it to examine the meaning of each word of the quoted passage and the opinion provides no guidance for us here.

[5] The verb "to process" certainly may refer to the narrower concept of preparing something in the sense of manufacturing it. However, it also has the broader definitions of subjecting something to a particular system of handling to effect a particular result and preparing something for market or other commercial use by subjecting it to a process. *See* Webster's Third New International Dictionary of the English Language (1963). We think these broader definitions include the actions of a distributor such as Bunnan, i.e., purchasing and selling goods in the ordinary course of trade in a distribution system.

jurisdiction in a products liability case. In *World-Wide Volkswagen*, the Court considered the property of an Oklahoma court's exercise of personal jurisdiction over two defendants in a products liability case. The plaintiffs in that case claimed injuries from an automobile accident that occurred in Oklahoma. They alleged that their foreign-manufactured automobile was defective and they sued the manufacturer, the importer, the regional distributor, and the retail dealer of the automobile. The regional distributor and retail dealer challenged the court's personal jurisdiction over them. Both defendants were incorporated in and had their places of business in New York, and that state was also where the plaintiffs had purchased the automobile.

The plaintiffs argued that the two defendants should be amenable to suit in Oklahoma because it was foreseeable that an automobile purchased in New York would cause injury in Oklahoma. The Court rejected these arguments, reasoning that a seller of chattels cannot be deemed to have appointed the chattel as his agent for service of process and that his amenability to suit does not travel with the chattel. The Court, however, did note that foreseeability is not irrelevant to the personal jurisdiction issue. It stated, "the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen*, 444 U.S. at 297. In further explanation of this point the Court observed,

> *[I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State. Cf. Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961).

*World-Wide Volkswagen*, 444 U.S. at 297-98.

Applying those principles to the case before it, the Court found no basis for Oklahoma jurisdiction over the regional distributor or retail dealer of the automobile. The retail dealer's sales were made in a city in New York and the regional distributor's market was limited to the states of New York, New Jersey and Connecticut. There were no contacts between those defendants and Oklahoma other than the fact that the plaintiffs had driven the automobile to that state and an injury occurred there. In addition, the court determined that whatever marginal revenues the two defendants received because the products they sold were capable of use in Oklahoma was too attenuated a contact to justify that state's exercise of personal jurisdiction over them. The Court therefore reversed the Oklahoma Supreme Court's decision upholding jurisdiction.

The *World-Wide Volkswagen* Court's recognition of a distinction among the various entities that might compose a distribution system of a product is pivotal to the decision in this case. The two defendants in *World-Wide Volkswagen* who were not amenable to Oklahoma jurisdiction were at the end of the automobile's distribution system. The scope of the foreseeble market served by those defendants and of the benefits those defendants derived from the sale of the product was narrow. In contrast, the relevant scope is generally broader with respect to manufacturers and primary distributors of products who are at the start of a distribution system and who thereby serve, directly or indirectly, and derive economic benefit from a wider market. Such manufacturers and distributors purposely conduct their activities to make their product available for purchase in as many forums as possible. For this reason, a manufacturer or primary distributor may be subject to a particular forum's jurisdiction when a secondary distributor and retailer are not, because the manufacturer and primary distributor have intended to serve a broader market and they derive direct benefits from serving that market. *See Hendrickson v. Reg O Co.*, 657 F.2d 9 (3d Cir. 1981); *De James v. Magnificence Carriers, Inc.*, 654 F.2d 280 (3d Cir.), *cert. denied*, 454 U.S. 1085 (1981); *Poyner v. Erma Werke GMBH*, 618 F.2d 1186 (6th Cir.), *cert. denied*, 449 U.S. 1083 (1980); *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980); *Samuels v. BMW of North America, Inc.*, 554 F. Supp. 1191 (E.D. Tex. 1983); *Rockwell International Corp. v. Costruzioni Aeronautiche Giovanni Augusta*, 553 F. Supp. 328 (E.D. Pa. 1982); *see also Froning & Deppe, Inc. v. Continental*

*Illinois National Bank & Trust Co.*, 695 F.2d 289, 291-93 (7th Cir. 1982).*

In this action, United's and Bunnan's functions in the distribution of the flannel shirts place them at the start of the system. This case, thus, is distinguishable from the facts underlying the holding of *World-Wide Volkswagen* because United and Bunnan are early actors in a distribution system which places and moves the product in the stream of commerce. *World-Wide Volkswagen* is also different because the allegedly defective product here not only caused injury in the forum, but it was also purchased there. The question remains, though, whether under the distribution system used here it can be said that United's and Bunnan's conduct and their connection with Wisconsin are such that they should reasonably anticipate being haled into court there.

In opposing jurisdiction, United and Bunnan maintain that the flannel shirt at issue was sold in Wisconsin only because of Woolworth's actions rather than theirs. They point out that Woolworth sought out Bunnan in Hong Kong and that Bunnan independently contacted United. Further, United submits that it had no control over the flannel shirts once they were sold to Bunnan and that it made no efforts to distribute the shirts anywhere. However, even though Bunnan and United did not originate the distribution system and do not control it, they did place the flannel shirts in and move them along a stream of commerce destined for retail sale throughout the United States in Woolworth's retail stores. In determining whether it is reasona ble to hale Bunnan and United into court in Wisconsin, a critical fact is whether those defendants were aware of that distribution system. If they were aware, they were indirectly serving and deriving economic benefits from the national retail market established by Woolworth, and they should reasonably anticipate being subject to suit in any forum

* These cases generally involve manufacturers or distributors who governed their own distribution systems and/or also engaged in activities in the forum soliciting sales of their products. Although evidence that a defendant manages its own distribution system or engages in other contacts with a forum presents a stronger case for exercising personal jurisdiction, such conduct is not a minimal requirement for jurisdiction as long as it can be said that a defendant's conduct and connection with a particular forum are such that it should reasonably anticipate being haled into court in that forum. *See World-Wide Voldkwagen*, 444 U.S. at 297-98; *Gray v. American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E.2d 761 (1961).

within that market where their product caused injury.[7]

In regard to the knowledge issue, affidavits, submitted by Woolworth allege that both Bunnan's and United's personnel were aware of Woolworth's distribution of products for retail sale in the ordinary course of trade. Bunnan does not dispute this fact and it would seem likely that it is true, since Bunnan has had direct contractual relations with Woolworth for many years and employees of the two companies have visited each other's offices in Hong Kong and New York many times. United's knowledge of the flannel shirts' distribution is a closer question. The district court noted that United was possibly aware of the scheme of distribution, but it found that United had no knowledge or expectation that Wisconsin consumers would purchase its shirts. *Nelson v. F.W. Woolworth Co.*, No. 81 C 646, slip op. at 6 (W.D. Wis. Jan. 14, 1983). We find, however, that on the record established and under the standards govenring at this stage of the litigation, United was more than possibly aware of Woolworth's distribution system. The Woolworth affidavits indicate that Woolworth personnel annually visited United's premises and that one of United's directors knew that the shirts manufactured under the "Topsall" label for Woolworth would be imported into the United States and sold at Woolworth retail outlets throughout the United States.[8] These allegations are sufficient for a prima facie showing and we therefore must assume United had full knowledge of the distribution scheme.

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[7] The district court determined that United did not deliver its products into the stream of commerce apparently because Woolworth went to Hong Kong to import flannel shirts and then distributed and sold them in the United States. We find this analysis of the stream of commerce theory too narrow. A manufacturer places a product in a stream of commerce whether it controls the distribution of the product or not. The relevant question for due process purposes in a personal jurisdiction challenge is whether the defendant "delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." *World-Wide Volkswagen*, 444 U.S. at 298. *See also* footnote 6 *supra*.

[8] Apparently, virtually all printed flannel shirts sold in the United States enter this country through some distribution system originating in a foreign country because 85% to 90% of all those shirts are manufactured by businesses outside the United States.

Woolworth's established distribution system funneled thousands of flannel shirts into its retail stores throughout the United States. For many years Bunnan acted as Woolworth's buying agent for those flannel shirts and for several years United manufactured them. The normal course of the distribution system brought several shirts to a retail store in Wisconsin and one was purchased for the minor plaintiff in this case. Bunnan and United were aware of the Woolworth distribution scheme and derived economic benefit from selling the flannel shirts they placed into and moved along the stream of commerce. We conclude that Bunnan and United were participating in that distribution system such that they should reasonably anticipate being haled into court in a forum where the system brought a shirt and allegedly caused injury. Therefore, we reverse the two orders dismissing United and Bunnan from this action for lack of personal jurisdiction.

It is so ordered.

A true Copy:

Teste:

---

*Clerk of the United States Court of Appeals for the Seventh Circuit*

Opinion by Judge Flaum

JUDGMENT — ORAL ARGUMENT

**UNITED STATES COURT OF APPEALS**

**For the Seventh Circuit**
**Chicago, Illinois 60604**

SEPTEMBER 13, 1983.

HON. WILLIAM J. BAUER, Circuit Judge,
HON. JOEL M. FLAUM, Circuit Judge,
HON. THOMAS E. FAIRCHILD, Senior Circuit Judge

---

Nos. 82-2631 and 83-1270

TELINA NELSON, *a minor*, by CINDRA R. CARSON, *Guardian ad Litem*, GERALD NELSON, and SHERRY NELSON, *Plaintiffs-Appellees*,

*v.*

F. W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY,
*Defendants-Appellants*,

*and*

BUNNAN TONG & COMPANY, LTD., and UNITED GARMENT MANUFACTURING COMPANY, LTD., *Defendants-Appellees*.

---

Appeal from the United States District Court for the Western District of Wisconsin.
No. 81 C 643--**John C. Shabaz**, *Judge*.

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This cause was heard on the record from the United States District Court for the Western District of Wisconsin, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby REVERSED, with costs, in accordance with the opinion of this Court filed this date.

CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of December, 1983, three copies of the Petiton for Writ of Certiorari were mailed, postage prepaid, to Frank T. Crivello, 710 North Plankinton Avenue, Milwaukee, Wisconsin 53203; Arnold P. Anderson, P.O. Box 1207, Eau Claire, Wisconsin 54702; and George H. Senteney, P.O. Box 1243, Eau Claire, Wisconsin 54702, counsel for the Respondents. I further certify that all parties required to be served have been served.

JEFFREY M. GALLAGHER
131 West Wilson Street
Suite 1200
P.O. Box 1784
Madison, Wisconsin 53701
(608) 256-0226

*Counsel for Petitioner, United Garment Manufacturing Company, Ltd.*

Office - Supreme Court, U.S.
FILED
JAN 17 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-955

# In the Supreme Court of the United States

October Term, 1983

UNITED GARMENT MANUFACTURING COMPANY, LTD.,

*Petitioner,*

*vs.*

TELINA NELSON, a minor, by CINDRA R. CARSON, Guardian ad Litem, GERALD NELSON, SHERRY NELSON, F.W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY,

*Respondents.*

On Petition For a Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

FRANK T. CRIVELLO
*Counsel of Record*
FRANK L. STEEVES
Riordan, Crivello, Carlson, Mentkowski & Henderson
710 North Plankinton Avenue
Milwaukee, Wisconsin 53203
(414) 271-7722

*Attorneys for the Respondents,*
F.W. Woolworth Company and Travelers Insurance Company

HAMMERSMITH-BREITHAUPT PRINTING CORP., MILWAUKEE, WIS. 53212

## QUESTION PRESENTED FOR REVIEW

Where a Hong Kong corporate manufacturer fabricated textile goods with complete knowledge and expectation that these goods were destined for the United States market, does an exercise of personal jurisdiction over that manufacturer in a state where one of those products caused injury violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

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## WISCONSIN LONG ARM STATUTE

[Laws of 1977]

801.05 *Personal jurisdiction, grounds for generally.* A court of this state having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to s. 801.11 under any of the following circumstances:

* * *

(4) *Local Injury; Foreign Act.* In any action claiming injury to person or property within this state arising out of an act or omission outside this state by the defendant, provided in addition that at the time of the injury, either:

* * *

(b) Products, materials or things processed, serviced or manufactured by the defendant were used or consumed within this state in the ordinary course of trade.

## CONSTITUTIONAL PROVISION INVOLVED

AMENDMENT XIV (Ratified July 9, 1868)

SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NO. 83-955

# In the Supreme Court of the United States

October Term, 1983

UNITED GARMENT MANUFACTURING COMPANY, LTD.,

*Petitioner,*

*vs.*

TELINA NELSON, a minor, by CINDRA R. CARSON, Guardian ad Litem, GERALD NELSON, SHERRY NELSON, F.W. WOOLWORTH COMPANY and TRAVELERS INSURANCE COMPANY,

*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

## STATEMENT OF CASE

In 1973 United Garment Manufacturing Company, Ltd. (hereinafter United Garment) of Hong Kong, through Bunnan Tong & Company, Ltd. (hereinafter Bunnan Tong), a Hong Kong broker, became the exclusive manufacturer of all 100% cotton flannel shirts purchased by the F.W. Woolworth Company of the United States (hereinafter Woolworth) for the import into the United States. (A 14-16). United Garment continued to manufacture all of the boys' 100% cotton flannel shirts for the F.W. Woolworth Company of the

United States from 1973 through 1977.[1] During these years, the Buyer of Men's Shirts for the F.W. Woolworth Company of the United States made annual visits to the premises of United Garment and had personal dealings with one of its directors, Peter Choi For Wing. (A 14-15).

Pursuant to arrangements through Bunnan Tong, all shirts that United Garment manufactured for F.W. Woolworth of the United States were retailed in the United States under the "Topsall" label. United Garment manufactured this label as well as the shirts and at all times Peter Choi For Wing was fully aware that those shirts his company manufactured under the "Topsall" label would be imported into the United States and sold at Woolworth's retail outlets to American consumers throughout the United States. Additionally, during the years that United Garment manufactured shirts under the "Topsall" label for Woolworth, United Garment also manufactured shirts under labels for other American distributors and retailers, including Mens' Wear International, a division of Van Heusen, and Montgomery Ward. (A 15).

Pursuant to an order placed by Woolworth to Bunnan Tong, in 1977 United Garment manufactured 4,300 dozen boy's 100% cotton flannel shirts under the "Topsall" label for Woolworth of the United States. These were labeled and packaged at United Garment's manufacturing facility in Hong Kong and then shipped by Woolworth to the United States for retail distribution. (A 8).

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[1] Due to the nature of the labor market in the textile industry, 85% to 90% of all 100% cotton flannel shirts sold in the United States since 1972 have been manufactured outside of the United States.

During the months preceding Christmas of 1977, the plaintiff's mother, Sherry Nelson, purchased one of those shirts manufactured for Woolworth's of the United States by United Garment under the "Topsall" label from a display containing several of the shirts in a Woolworth store in Rice Lake, Wisconsin. The minor plaintiff, Telina Nelson, was given one of the "Topsall" cotton flannel shirts for Christmas of 1977 by her mother. (A 1-6). Telina Nelson's cause of action arose when this shirt came into contact with an open flame from a Park Industries, Inc. butane cigarette lighter. This caused the "Topsall" shirt to ignite, inflicting horrific and permanently disabling injuries.

On September 14, 1981, by her guardian ad litem, Telina Nelson filed a diversity action against the F.W. Woolworth Company,[2] The Travelers Insurance Company[3] and the manufacturer of the butane lighter, Park

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[2] The F.W. Woolworth Company has no parent company, no subsidiaries other than wholly-owned subsidiaries and no affiliates.

[3] The Travelers Insurance Company is an insurer of Woolworth. It is a wholly-owned subsidiary of The Travelers Corporation. The Travelers Insurance Company has no subsidiaries or affiliates of its own. The Travelers Corporation, however, has the following wholly-owned subsidiaries which may be considered affiliates to The Travelers Insurance Company: The Charter Oak Fire Company; Constitution Plaza, Inc.; Derby Advertising, Inc.; Keystone Custodian Funds, Inc.; The Massachusetts Companies, Inc.; The Phoenix Insurance Company; The Plaza Corporation; The Prospect Company; Travelers Equities Sales, Inc.; The Travelers Indemnity Company of America; The Travelers Indemnity Company; The Travelers Indemnity Company of Illinois; The Travelers Indemnity Company of Rhode Island; The Travelers Insurance Company of Illinois; The Travelers Investment Management Company; The Travelers Life and Annuity Company; The Travelers Life Insurance Company and The Travelers Marine Corporation.

Industries, Inc. Her Complaint was amended on June 2, 1982 adding Bunnan Tong & Company, Ltd. and United Garment Manufacturing Company, Ltd. as defendants. On January 14, 1983 however, although finding that a basis for jurisdiction existed under Wisconsin's long arm statute, the District Court entered an Order dismissing United Garment from the action holding that an exercise of that long arm jurisdiction would violate the Due Process Clause to the Fourteenth Amendment of the United States Constitution.

Woolworth and Travelers then moved the Court to direct the entry of final judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure. This motion was denied by the District Court on February 1, 1983. On February 3, 1983, Woolworth filed a Notice of Appeal. Despite the expressed position of the plaintiff in support of Woolworth's action, the District Court on February 3rd also issued an Order to its Clerk preventing transmittal of the record to the Seventh Circuit. The District Court noted in this Order: ". . . nor does this Court endorse such an appeal under 28 U.S.C. 1292(b) . . ." Despite the stated position of the parties (with the exception of Bunnan Tong and United Garment) that forcing this case to trial would be extremely and irreparably damaging to the plaintiff, her parents and Woolworth, very wasteful of financial, human and judicial resources while working a great injustice to all concerned, the Court noted further in its Order that: "If requested, a stay pending appeal would be denied by this Court."

Subsequently, and after a review of the entire course of proceedings below, the Seventh Circuit on April 7, 1983, exercised its appellate jurisdiction and issued a stay to the District Court pending appeal. This Order was predicated upon an express finding that the circumstances of the instant case fit squarely within the narrow-

ly defined and limited criteria necessary for an application of the United States Supreme Court's holding in *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964).

The District Court's January 14th Order dismissing United Garment was reversed by the United States Court of Appeals for the Seventh Circuit on September 16, 1983,[4] and United Garment has petitioned the Supreme Court of the United States to review the decision of the Seventh Circuit.

## SUMMARY OF ARGUMENT

The Petitioner in its brief seeks principally to remake the record which was established in the District Court. It fails to demonstrate conflicts among the courts of appeals pursuant to Supreme Court Rule 17(a) or significant questions of federal law which have not been but should be ruled upon by the Court pursuant to Supreme Court Rule 17(c). Under the record in the instant case, there is no conflict between the opinion of the Seventh Circuit and any applicable decision of the United States Supreme Court.

The Petitioner also seeks review of a Seventh Circuit Order dated April 7, 1983. Under Supreme Court Rule 20, the petition in this regard is not timely and should not be considered. Nevertheless, the Petitioner fails to demonstrate that the Circuit Court's April 7th Order conflicts with decisions of other courts of appeals on the same matter or is in conflict with applicable decisions of the United States Supreme Court.

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[4] The decision of the Seventh Circuit is reported in the Federal Reporter as *Nelson by Carson v. Park Industries, Inc.*, 717 F.2d 1120 (7th Cir. 1983).

## ARGUMENT

In its brief, United Garment has materially distorted those portions of the record which were pertinent to the decision of the Seventh Circuit. It has then used this distorted version of the record from which to argue that the Court of Appeals for the Seventh Circuit incorrectly decided the issue of personal jurisdiction.

These material distortions are found throughout the Petitioner's Brief. United Garment states that "the Court of Appeals reversed . . . because United Garment had placed its goods in the stream of commerce while aware that Woolworth would be the ultimate retail distributor and that Woolworth had retail stores throughout the world, including the United States." (Petitioner's Brief at 3). This was not the Court's basis for its reversal of the District Court. The salient and controlling fact in the Seventh Circuit was United Garment's undisputed knowledge and expectation that all the textile products they manufactured with the "Topsall" label for the F.W. Woolworth Company of the United States would be imported into the United States and sold at Woolworth retail outlets throughout the United States. 717 F.2d at 1126, 1127.

Nor is it true or reflected in the record that "United Garment had no role and had no contact whatsoever with Woolworth in the transaction." *Compare* (Petitioner's Brief at 3) *with* 717 F.2d at 1127. Moreover, omitted is the fact that for a period of five years United Garment manufactured all of the 100% boys' cotton flannel shirts sold by Woolworth in the United States. Instead, it is stated that United Garment filled a single order for Bunnan Tong knowing only that the same would be retailed worldwide by Woolworth.

There can be little dispute over the proposition that from their sale of 4,300 dozen boy's shirts intended for national distribution in the United States, United Garment received a substantial financial benefit. 717 F.2d at 1127. The Petitioner's portrayal of their transaction with Bunnan Tong as a blind sale of goods with only possible awareness that their product would be distributed throughout a worldwide market that included the United States is blatantly misleading. Equally misleading is United Garment's contention that the Court of Appeals found jurisdiction solely on the basis of this "awareness".

United Garment's principal contention appears to be that, under Supreme Court Rule 17(a), the Seventh Circuit's opinion is in conflict with decisions from other courts of appeals on the same issue. The petitioner also contends that the opinion of the Seventh Circuit is in conflict with the opinion of the United States Supreme Court in *World-Wide Volkswagen Corp. v. Woodsen,* 444 U.S. 286 (1980). Neither of their contentions is true. The decision over which United Garment seeks review shows that jurisdiction was found based upon the approval in *World-Wide Volkswagen* of *Gray v. American Radiator & Standard Sanitary Corp.,* 22 Ill.2d 432, 176 N.E.2d 761 (1961):

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its products in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce

> with the expectation that they will be purchased by consumers in the forum State. (Citation omitted).
>
> *World-Wide Volkswagen,* 444 U.S. at 297-98, 100 S.Ct. at 567.

*Nelson by Carson v. Park Industries, Inc.,* 717 F.2d at 1125.

Despite the Petitioner's statements in their brief to the contrary, those undisputed portions of the record alone require a finding of personal jurisdiction under the opinion of the Court in *World-Wide Volkswagen.* The sole relevant dispute in the record, i.e., whether United Garment from 1973 through 1977 manufactured all 100% boy's cotton flannel shirts for Woolworth intended for resale in the United States or simply the 4,300 dozen of which one allegedly caused injury to the plaintiff is not necessarily determinative of jurisdiction. Nevertheless it must, in fact, be resolved in favor of Woolworth and the plaintiffs. 717 F.2d at 1123.

In an attempt to show that the opinion of the Seventh Circuit conflicts with those of other courts of appeals on the same matter, the Petitioner has cited cases from the Fifth, Sixth, Seventh, Ninth and Tenth Circuits. United Garment contends that each of these cases stands for their proposition that foreign manufacturers cannot be subject personally to jurisdiction in the United States without having directly participated in a distribution system aimed at the United States market.

None of the cases cited by United Garment stands for any proposition except that, prior to upholding jurisdiction, the defendant's conduct, knowledge, expectation and financial benefit gained from the marketing of its goods must be examined. In *Oswalt v. Scripto, Inc.,* 616 F.2d

191 (5th Cir. 1980), the Court found that the existence of a distribution agreement involving a nation-wide market evidenced the Japanese defendant's expectation that their cigarette lighters would reach a particular state that comprised a part of that market. Tokai-Seiki KK contended that it had no contacts whatsoever with the State of Texas or the United States. The Court held, however, as did the Court below, that the Affidavits indicated an expectation or reason to know, on the defendant's part, that their product would be retailed in Texas. 616 F.2d at 198.

In the instant case, the existence of undisputed evidence substantiating United Garment's knowledge and expectation that the shirts they manufactured under the "Topsall" label would be marketed throughout the United States led the Seventh Circuit through the same reasoning to an identical result.

Although some of the Petitioner's remaining cases do discuss the relevance of participation in a distribution network, e.g., *Poyner v. Irma Worke Gimbel GmbH,* 618 F.2d 1186 (6th Cir. 1980), *cert. denied,* 449 U.S. 841 (1980), *Fisons, Ltd. v. United States,* 458 F.2d 1241 (7th Cir. 1972), *cert. denied,* 405 U.S. 1041 (1972), *Duple Motor Bodies, Ltd. v. Hollingsworth,* 417 F.2d 231 (9th Cir. 1969) and *Shank v. Westland Equipment and Parts Co.,* 668 F.2d 1165 (10th Cir. 1982), each case stands for the same proposition as *Oswalt.* It is interesting to note that since the Ninth Circuit's holding in *Duple Motor Bodies, Ltd.* that Court has found jurisdiction in *Raffaele v. Compagnie Generale Maritime,* 707 F.2d 395 (9th Cir. 1983), and *Hedrick v. Daiko Shoji Co., Ltd., Osaka,* 715 F.2d 1355 (9th Cir. 1983), where the defendants had no control, participation or direct contact with the forum in which jurisdiction was sought. Instead, evi-

dence entirely separate and distinct from allegations of control over a distribution network was held to support a finding of personal jurisdiction.

It was established in *World-Wide Volkswagen* that the critical determination is whether the defendant over whom jurisdiction is sought placed goods into a stream of commerce that it knew or had reason to know would lead to the forum where the plaintiff was injured. United Garment did place its goods into a stream of commerce that, without question, it knew led directly to the entire United States market. United Garment should have known that the State of Wisconsin is part of that market. Had United Garment controlled or participated directly in Woolworth's United States retailing operation, that participation would have been a jurisdictionally significant factor. The lack of direct participation, however, is not jurisdictionally fatal if other evidence reveals the defendant's knowledge and expectation. In claiming that direct participation in a distribution network is a critical and necessary factor for a finding of jurisdiction, United Garment is seeking, understandably, to serve the United States market with its products while remaining shielded from its Courts through a structure of business relationships. This is contrary to the holdings of each case cited and particularly to *World-Wide Volkswagen,* wherein it is stated:

> The Due Process Clause, by insuring the "orderly administration of the laws," (citation omitted), gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.

*World-Wide Volkswagen Corp. v. Woodsen,* 444 U.S. at 297. United Garment did structure its conduct to utilize Woolworth's retail distribution network as an outlet for its products on a national retail level in the United States deriving a substantial economic benefit from this conduct. Accordingly, under established and uncontradicted principles involving the protections extended by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, United Garment can be held responsible for its actions in the courts of the State of Wisconsin.

Without explanation, United Garment also suggests that the requirements of Supreme Court Rule 17(c) may be met insofar as the instant case involves: (1) a manufacturer; (2) an international distribution system "dominated by a giant international conglomerate middle-marketer"; and (3) a defendant whose sole contact with the United States was a "mere awareness of the giant marketer's retail system". Without extensive comment: United Garment's first point would have relevance only in support of jurisdiction, the manufacturer being at the start of a distribution system; their second is immaterial insofar as United Garment expected their goods to be marketed specifically in the United States; and their third statement is a distortion of United Garment's knowledge and conduct in this case.

The Petitioner contends that the foreign sovereignty discussed in *Insurance Company of North America v. Marina Salina Cruz,* 649 F.2d 1266 (9th Cir. 1981), is significant to the issue of personal jurisdiction. In this regard, it is noteworthy that the Court in *Insurance Company of North America* specifically discussed the relevance of foreign sovereignty insofar as the Marina Salina Cruz was 100% owned by the Mexican government.

Governmental interest or ownership has not been demonstrated with regard to United Garment. Moreover, there is no indication in the record of this case that the government of the British Crown Colony of Hong Kong has ever expressed any indication or desire to exercise jurisdiction over an issue that has arisen during the course of this litigation.

The Petitioner also suggests that the plaintiffs can get full relief from Woolworth and that if Woolworth can travel to Hong Kong to purchase goods for resale in the United States, it can also travel to Hong Kong to litigate claims for contribution. Aside from the fact that these contentions are devoid of jurisdictional materiality, neither is necessarily true. In *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 729 (Minn. 1980), *cert. denied,* 449 U.S. 921 (1980), a jury verdict was upheld which found cotton flannel pajamas that ignited causing injury to be defective when it left the control of the manufacturer and that this defect caused the plaintiff's injuries. The jury found, however, that although the pajamas remained defective when they left intermediaries in the stream of commerce, those defects did not cause the plaintiff's injuries. Lastly, any claim for contribution would necessarily be based upon a strict liability theory and the Petitioner has presented no evidence or support, outside of its bare statement, that the Courts of Hong Kong even recognize a remedy for contribution based on strict liability in tort.

• • •

In their brief, the Petitioner has raised the issue of whether the United States Court of Appeals should have accepted review of the District Court's dismissal orders. While the decision of the Court was not issued until September 16, 1983, the decree over which United Garment now seeks review was rendered on April 7, 1983. (Petitioner's Brief at App. 8). United Garment's petition seeking review of the April 7th Order was not filed until December 10, 1983. It was not received by the Respondents until December 12, 1983.

Under Supreme Court Rule 20.4: "The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate. . .". Under Rule 20, if a request for a rehearing is timely filed, the time for filing a Petition will run from the date of a denial of that request. In the instant case no rehearing was requested following the April 7th Order and United Garment's Petition with regard to that Order is not timely and should not be considered by the Court.

With regard to the merits respecting the issue of the Seventh Circuit's ability to review the District Court orders, apparently the Petitioner feels that this decision demonstrates a conflict with rulings of other courts of appeals on the same matter and that this makes review of the April 7th Order appropriate under Supreme Court Rule 17(a).

In support of this contention a number of cases are cited from which it is claimed that the case of *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964), has never been used to exercise jurisdiction over an Order dismissing some but not all parties except in unusual circumstances. (Petitioner's Brief at 8). In contending, how-

ever, that *Gillespie* has never been used, one way or the other, by another circuit court in the same way the Seventh Circuit utilized that decision, the Petitioner has not demonstrated that the use of that decision in the instant case is in conflict with another decision by a court of appeals on the same matter.

In *Gillespie v. United States Steel Corp.*, 321 F.2d 518 (6th Cir. 1963), the Sixth Circuit held that under the circumstances of that case a decision on the merits was, in fact, a final order despite its technical deficiencies insofar as the immediate appeal saved considerable time, expense and effort without creating any additional stress on the judicial machinery. 321 F.2d at 520-521 n.1, 522.

The Supreme Court of the United States affirmed. 379 U.S. 148. Mr. Justice Black, speaking for the court stated:

> . . . our cases long have recognized that whether a ruling is "final" within the meaning of §1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty, this Court has held that the requirement of finality is to be given a "practical rather than a technical construction".

*Gillespie v. United States Steel Corp.*, 379 U.S. at 152. The Court stated that the most important competing considerations in deciding the question of finality were "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other." 379 U.S. at 152-153, *quoting, Dickinson v. Petroleum Conversion Corp.*, 388 U.S. 507, 511 (1950).

In evaluating the competing considerations in *Gillespie*, Mr. Justice Black declared:

> Such competing considerations are shown by the record in the case before us. It is true that the review of this case by the Court of Appeals could be called "piecemeal"; but it does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. We cannot say that the Court of Appeals chose wrongly under the circumstances. And it seems clear now that the case is before us that the eventual cost, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided. Moreover, delay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them. . . .

*Gillespie v. United States Steel Corp.*, 379 U.S. at 153. The Court noted that in *United States v. General Motors Corp.*, 323 U.S. 373 (1945), it had reviewed a trial court's refusal to permit proof of certain damaged items in a case not fully tried because the ruling was "fundamental to the further conduct of the case." *Id., quoting* 323 U.S. at 377. Finally, Mr. Justice Black found that, although the District Court had refused to issue a Section 1292(b) certificate, "the Court of Appeals properly implemented the same policy Congress sought to promote in §1292(b) by treating this obviously marginal case as final and appealable under 28 U.S.C. §1291 . . .". 379 U.S. at 154.

The *Gillespie* rule is one of limited applicability. In *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 n.30 (1978), the Court pointed out that the *Gillespie* rule

should not be "extended beyond the unique facts of that case, (since) §1291 would be stripped of all significance." The Court pointed out that in *Gillespie* the marginally final order disposed of an unsettled issue of national significance and that the finality issue had been raised at such a time so as to ensure that "none of the policies of judicial economy served by the finality requirement would be achieved were the case sent back with the important issue undecided." *Id.*

In the present case, the Seventh Circuit was in accord with *Gillespie* and correct in asserting appellate jurisdiction over the two orders dismissing United Garment and Bunnan Tong for lack of personal jurisdiction. The question presented for review, although discussed in *World-Wide Volkswagen* and not in conflict with the decisions of other courts of appeals, was fundamental to the further conduct of this case. The jurisdictional question is fundamental to the further conduct of the case because United Garment and Bunnan Tong are critical parties in the stream of commerce and are both potentially liable along with Woolworth to the plaintiffs. Review of the question by the Seventh Circuit implemented the same policy Congress sought to promote in §1292(b).

None of the policies of judicial economy served by the finality requirement would be achieved were the Court to reverse and vacate the Seventh Circuit's decision in this case. The question was fully briefed and argued and correctly decided below. Reversal for lack of finality would defeat the purposes behind the final judgment rule. Most importantly, the Seventh Circuit was correct in determining that the danger of denying justice by delay in this case outweighed the competing considerations of

inconvenience and costs of piecemeal review. Several factors present in this case lead to this conclusion. The question presented here would ultimately have been heard on appeal after a final judgment but at considerable expense and irreparable harm to both the plaintiffs and Woolworth. The likelihood that the order from which the appeal is sought will be reversed must also be considered by a court in applying *Gillespie*. In this case, the District Court had clearly erred in applying *World-Wide Volkswagen*.

Those orders dismissing Bunnan Tong and United Garment were for all purposes final. The Court expressed a refusal to entertain requests under Section 1292(b) and despite repeated claims from all remaining parties, particularly the plaintiffs, of hardship and actual harm by the refusal to enter judgment, the Court declined to do so.

The Order of April 7, 1983 is limited to the unique facts which represent the procedural history of this case. Further review of that Order will serve only to frustrate and undermine the judicial process with regard to all outstanding claims in this action.

## CONCLUSION

The Petitioner has failed to demonstrate either a conflict among courts of appeals on the same matter or the existence of an important question of federal law which has not been but should be settled by the Court. Accordingly, it is requested that their Petition for the issuance of a writ of certiorari be denied.

*Respectfully submitted,*

FRANK T. CRIVELLO
*Counsel of Record*
FRANK L. STEEVES
Riordan, Crivello, Carlson,
Mentkowski & Henderson
710 North Plankinton Avenue
Milwaukee, Wisconsin
(414) 271-7722

*Attorneys for the Respondents,*
F.W. Woolworth Company and
The Travelers Insurance
Company

# APPENDIX OF RESPONDENTS

# EXCERPTS FROM DEPOSITION OF SHERRY NELSON CONDUCTED ON JULY 7, 1982

Sherry Nelson, having been first duly sworn, testified as follows:

*(Adversely examined by Mr. Crivello)*

[Page 27]

Q. Can you tell me how long Telinda had had this shirt before this incident occurred? A. It was bought in December and she received it for Christmas so by the time the accident happened it would have been about ten months.

Q. I have indicated that it was purchased on December 4 of '77? A. I'm not sure about the date, but it was the first weekend of December.

* * *

[Page 31]

Q. Did you know when you went into Woolworth's what you were going to buy? A. No.

Q. What made you decide, if anything, other than possible need to get a shirt for Teli? A. We saw them there. They had a sale on them and it was a good buy and we decided because we camp a lot and because the evenings are chilly and so forth we decided to buy flannel shirts.

Q. And they were on sale? A. Yes.

Q. Did you first become aware of that when you got into the store and you saw this counter sale and you went over there? A. Yes.

[Page 32]

Q. And you go camping a lot so a heavier shirt would be good for Teli? A. Right.

Q. Okay. Can you tell me where this counter was located in relation to any entrances to that store? A. It would have been close to the mall entrance in the children's section.

* * *

[Page 33]

Q. The Woolworth's store carries many different items, is that correct? A. Correct.

Q. Can you tell me how large that counter was? A. No, I can't.

Q. When you say it was a counter, was it a display counter, was it a display window? What type of counter was it? A. What do you mean by display counter?

Q. Were a number of shirts or a number of items on the counter

[Page 34]

or was this the only one on there or were there just a couple of them on there? A There were several on the counter on the top.

Q. Several shirts? A. Yes.

Q. Was there any other item other than this type of shirt on that counter? A. No.

Q. Were there any signs on the counter? A. Only a sale sign.

* * *

[Page 35]

Q. Okay. How many shirts did you buy that day from that particular counter? A. I bought two.

Q. And for whom? A. I bought one for Staci and one for Teli.

Q. All right. Do you know if the shirt you bought that day for Staci was the one she had on on the date or if she had that one on on the date this incident occurred? A. I don't recall what shirt she had on that day.

Q. Were these shirts in packages or were they folded not in

[Page 36]
packages? What was the situation? A. They were folded in a cellophane package of some sort.

Q. Could you see obviously through the cellophane? A. Yes.

Q. Okay. Did the cellophane have any printing on it? A. Yes, it did.

Q. What did it say? A. I don't recall exactly.

Q. Do you recall whether the printing was large or small? What can you tell me about the printing? A. All I can recall is that it was written at an angle. It was in a print and it was white.

Q. The package was cellophane? A. Yes.

Q. There was printing on it as opposed to writing on it? A. Yes.

Q. And the printing was in white? A Yes.

Q. Anything else — strike that. You say it was on a diagonal? A. Yes.

Q. How do you know that that is the shirt that Teli had on on the date of this incident? A. Because of the accident I remember it.

Q. Anything else that leads you to the conclusion that the shirt Teli had had on on the date of this occurrence

[Page 37]

was the one you purchased in the first week of December, '77? A. Yes. My girlfriend was there and bought shirts of the same type.

* * *

Q. Do you recall what size shirt you bought that day or what

[Page 38]

size shirts? You say you bought two of them. What sizes were those shirts? A. I bought a size 8 and a size 10.

Q. Did you give that shirt to Teli for Christmas? A. Yes, I did.

* * *

Q. What do you remember about looking for sizes? A. Just that I found the size that would fit them the closest. Eventually they would grow into them so I went ahead and bought them anyway.

Q. What sizes — or strike that. Was the size 10 that you purchased off of this same counter? A. Yes.

Q. So the 8 and 10 were both there?

[Page 39]

A. Yes.

Q. Were there any other sizes on that counter? A. I remember they went up to size 14.

* * *

Q. How many labels, if more than one, were you able to visualize when you were shopping for this shirt? A. Only one.

Q. Would that be the tag on the back of the neck? A. Yes.

Q. How large was that tag? A. I don't know.

* * *

[Page 40]

Q. Do you remember anything else about that label that was either written on it that you saw that you remember now? A. I remember the name "Tops All" or "Top All" printed on it.

Q. Do you know what color that was in? A. No, I don't.

Q. Were the labels on the size 8 and the size 10 identical except for size designations? A. As far as I can remember they were.

* * *

[Page 43]

Q. Did your girlfriend, did you say she bought some shirts off the same counter? A. Yes.

Q. Do you recall how many she purchased?

[Page 44]

A. She bought four.

Q. Do you recall what sizes they were? A. No, I don't.

Q. Were they for her children? A. For her son.

* * *

Q. When you opened the shirt at Christmas time, were you able to determine if there were any other labels other than this

[Page 45]

one that you recall and have told us about? Were there any other labels in the shirt anyplace? A. Not that I recall.

Q. None at all? A. Not that I recall.

Q. Okay. How about a laundering tag? A. It's possible, but I don't remember.

Q. You just don't remember any others than this one? A. I don't.

Q. Is that correct? A. Correct.

Q. Did Teli wear this shirt from the Christmas time throughout the winter season? A. Yes.

Q. Can you tell me approximately how many times she wore that shirt before this incident occurred? A. I can't tell you. They just wore it whenever the weather needed it, warranted it.

Q. The weather through — A. Through the wintertime.

* * *

## AFFIDAVIT OF NAI YAN CHAN

[*Venue and caption omitted*]

I, Nai Yan Chan, being first sworn on oath, depose and state as follows: —

(1) That I have been a Director of Bunnan Tong and Company Limited of Hong Kong (hereinafter called "the Company") since 1974 and I was a director of the Company on or about October 28, 1978 and still am a director of the Company.

(2) That I make this affidavit based upon my personal knowledge or after a review of the records of the Company which are kept in the ordinary course of business.

(3) That the Company is duly incorporated under the laws of Hong Kong and is an exporter and agent for foreign buyers of general merchandise

including but not limited to textile products manufactured in Hong Kong and other South East Asian countries.

(4) That the Company has never been licensed to do business in the State of Wisconsin.

(5) That the Company does not own any real or personal property within the State of Wisconsin.

(6) That the Company does not employ any individuals within the State of Wisconsin.

(7) That the Company does not maintain any office in the State of Wisconsin

(8) That the Company has never had any agents, sales persons, distributers or advertised in the State of Wisconsin.

(9) That the Company has never made any business calls to any contacts in the State of Wisconsin.

(10) That the Company has never had any advertising done on its behalf in the State of Wisconsin to solicit business.

(11) That F. W. Woolworth Company is not nor has it ever been the Company's agent or representative in the State of Wisconsin.

(12) That the Company has never serviced any of its products in the State of Wisconsin.

(13) That the Company acted as the buying representative of F. W. Woolworth Company in Hong Kong whose staff came to Hong Kong to place orders for shirts carrying label "TOPSALL" (hereinafter called "the said goods") with the Company in early 1976. The Company then pur-

chased the said goods on behalf of F. W. Woolworth Company at an agreed commission from United Garment Manufacturing Company Limited of 1151-1153 Canton Road, First Floor, Hong Kong, F.O.B. Hong Kong.

(14) That the said goods were delivered by the Company to WESTERN NAVIGATION (FAR EAST) LIMITED, formerly of Nos. 15-19, Ha Heung Road, 6th floor, To Kwa Wan, Kowloon presently of Rooms 712-715, world Commerce Centre, 11 Canton Road, Tsimshatsui, Kowloon, forwarders in Hong Kong nominated by F. W. Woolworth Company, who in turn on the instructions of F. W. Woolworth Company arranged to have the said goods shipped to New York, Boston, Philadelphia, San Francisco and Los Angeles. None of the said goods were shipped directly to anywhere in the State of Wisconsin.

(15) That the Company has not done anything with the goods in question to prepare them for sale.

(16) That physical control and custody of the said goods passed to F. W. Woolworth Company once the said goods were delivered over the rail of the vessel sailing to the United States.

(17) That F. W. Woolworth Company paid for the insurance and the cost of shipping the said goods from Hong Kong to their destinations in the United States.

(18) That the Company has never received any direct benefit or protection as a result of laws of the State of Wisconsin in the course of its business.

(19) That the Company has never been involved in a suit in the State of Wisconsin, either as a plain-

tiff or a defendant, or submitted to the jurisdiction of the Wisconsin Courts.

(20) That there was no service of summons upon the Company within the State of Wisconsin.

(21) That the Company received the Summons and Complaint in Hong Kong.

/s/ Nai Yan Chan

Nai Yan Chan

Subscribed and sworn to before me this
17th day of August, 1982.

/s/ Kenneth Lo

Notary Public, Hong Kong

KENNETH LO
Notary Public
Hong Kong

## AFFIDAVIT OF PETER CHOI

[*Venue and caption omitted*]

I, Peter Choi, being first duly sworn, depose and state as follows:

1. I have been a director of United Garment Manufacturing Company, Ltd., of Hong Kong (hereinafter "the Company") since 1976; that I was a director of the Company on or about October 28, 1978; and that I currently am one of three directors of the company.

2. I make this affidavit based upon my personal knowledge or after a review of the records of the Company which are kept in the ordinary course of business.

3. The Company was organized as a limited liability company in Hong Kong in 1957 and is presently duly incorporated under the laws of Hong Kong. The Company manufactures textile products in Hong Kong.

4. The Company is not now licensed and has never been licensed to do business in the state of Wisconsin, or elsewhere in the United States.

5. The Company does not now own and has never owned any real or personal property within the state of Wisconsin or elsewhere in the United States.

6. The Company does not now employ and has never employed any individuals within the state of Wisconsin or elsewhere in the United States.

7. The Company does not now maintain and has never maintained any office in the state of Wisconsin or elsewhere in the United States.

8. The Company has never had any agents, representatives, employees, sales persons or distributors in the state of Wisconsin or elsewhere in the United States.

9. Neither the Company nor any representative of the Company has ever made any business trips or calls to anyone in the state of Wisconsin or elsewhere in the United States.

10. The Company has never had any advertising done on its behalf to solicit business in the state of Wisconsin or elsewhere in the United States.

11. Neither F. W. Woolworth Company nor Bunnan Tong and Company, Ltd. ("Bunnan Tong") are now nor ever have been the Company's agent or representative in the state of Wisconsin or elsewhere in the United States.

12. The Company has never serviced any products in the state of Wisconsin or elsewhere in the United States.

13. The Company sold certain "Topsall" shirts to Bunnan Tong in Hong Kong with deliveries to Bunnan Tong in Hong Kong in early 1977. Other than these deliveries, the Company never sold "Topsall" shirts.

14. Thereafter, the Company had nothing further to do with or further interest in the "Topsall" shirts sold to Bunnan Tong.

15. The Company has never received any direct benefit or protection as a result of the laws of the state of Wisconsin in the course of its business.

16. The Company has never been involved in a suit in the state of Wisconsin, either as a plaintiff or a defendant, or submitted to the jurisdiction of the Wisconsin courts.

17. There was no service of summons upon the Company within the state of Wisconsin.

18. The Company received the summons and complaint in this action in Hong Kong.

DATED: November 12, 1982

/s/ Choi

Peter Choi For Wing

Consulate General of the )
United States of America) SS:
at Hong Kong )

Subscribed and sworn to before me this 12th day of November, 1982.

/s/ Barbara Tobias

Barbara Tobias
*American Consul*

## AFFIDAVIT OF CHARLES W. TURNER
### (Turner Affidavit I)

[*Venue and caption omitted*]

STATE OF NEW YORK :
: SS.
COUNTY OF NEW YORK:

CHARLES W. TURNER, being first duly sworn, states as follows:

1. Your affiant presently holds the position of Buyer of Men's Shirts for F. W. Woolworth Company of the United States; Your affiant has held this position for the past 15 years and has been an employee of F. W. Woolworth Company of the United States for the past consecutive 42 years.

2. For a period commencing in 1972 and ending in 1982, your affiant has conducted personal business dealings in Hong Kong, with Bunnan Tong & Company, Ltd., dealing personally and directly with Nai Yan Chan, a director of said company, and T. K. Tong, the owner and managing director of said company; said dealings with Bunnan Tong & Company, Ltd., and the above-stated persons, centered around F. W. Woolworth Company's use of the services of Bunnan Tong & Company, Ltd., as a middleman for the purchase of shirts, in bulk, for sale at Woolworth's retail stores throughout the United States.

3. F. W. Woolworth Company of the United States has dealt regularly and extensively with Bunnan Tong & Company, Ltd., as a broker and importer of men's shirts and other merchandise, since the end of World War II; In addition to dealing with F. W. Woolworth Company of the United States, Bunnan Tong & Company, Ltd.,

has also, since the end of World War II, engaged in extensive business dealings, on a similar basis, with F. W. Woolworth Company of Canada, United Kingdom and West Germany.

4. In your affiant's personal dealings and meetings with T. K. Tong over the years, Mr. Tong has expressed and indicated detailed familarity with the scope and extent of F. W. Woolworth Company's operations on an international scale.

5. During the late 1960's and early 1970's, before your affiant made yearly trips to Bunnan Tong & Company, Ltd., in Hong Kong, both T. K. Tong and Nai Yan Chan made periodic business visits to the corporate offices of F. W. Woolworth Company in New York City.

6. Both T. K. Tong and Nai Yan Chan, during the years I dealt personally with them, were fully aware that F. W. Woolworth Company retailed the shirts purchased via Bunnan Tong & Company, Ltd., throughout the United States.

/s/ Charles W. Turner

CHARLES W. TURNER

Subscribed and sworn to before me
this 6 day of December, 1982.

/s/ Lillian M. Schultz

Notary Public, State of New York

My Commission: 3/30/83

LILLIAN M. SCHULTZ
Notary Public, State of New York
No. 0632300
Qualified in Kings County
Commission Expires March 30, 1983

## AFFIDAVIT OF CHARLES W. TURNER
(Turner Affidavit II)

*[Venue and caption omitted]*

STATE OF NEW YORK :
: SS.
COUNTY OF NEW YORK:

CHARLES W. TURNER, being first duly sworn, states as follows:

1. Your affiant presently holds the position of Buyer of Men's Shirts for F. W. Woolworth Company of the United States; Your affiant has held this position for the past 15 years and has been an employee of F. W. Woolworth Company of the United States for the past consecutive 42 years.

2. For a period commencing in 1972 and ending in 1982, your affiant has conducted personal business dealings in Hong Kong, with Bunnan Tong & Company, Ltd., dealing personally and directly with Nai Yan Chan, a director of said company, and T. K. Tong, the owner and managing director of said company; said dealings with Bunnan Tong & Company, Ltd., and the above-stated persons, centered around F. W. Woolworth Company's use of the services of Bunnan Tong & Company, Ltd., as a middleman for the purchase of shirts, in bulk, for sale at Woolworth's retail stores throughout the United States.

3. For a period of approximately four to five years, from 1973 through 1977, United Garment Manufacturing Company, Ltd., hereinafter referred to as United Garment, was the exclusive manufacturer of all 100% cotton flannel boy's shirts purchased by F. W. Wool-

worth Company of the United States, through their broker and importer, Bunnan Tong & Company, Ltd.,

4. During said four to five year period, your affiant visited the premises of United Garment in Hong Kong at least once each year, and on these visits, had personal dealings with the owner of the company, and primarily with one of the directors of the company, Peter Choy For Wing

5. United Garment manufactured boy's 100% cotton flannel shirts specifically for Woolworths, during said years, under the Topsall label; Topsall was Woolworth's label during said years, and United Garment had full knowledge of this fact, and actually, manufactured the Topsall label on Woolworth shirts for Woolworth.

6. Peter Choy For Wing was fully aware that the shirts United Garment manufactured under the Topsall label for Woolworth would be imported into the United States and sold at Woolworth retail outlets throughout the United States.

7. During said years when United Garment manufactured shirts under the Topsall label for Woolworth, United Garment also manufactured shirts under labels for other American distributors and retailers, including specifically, Men's Wear International, a division of Van Heusen, and Montgomery Ward.

8. Because of the nature of the labor market in the textile industry, for at least the last 10 years, 85% to 90%

of all cotton flannel shirts sold in the United States have been manufactured outside of the United States.

/s/ Charles W. Turner

CHARLES W. TURNER

Subscribed and sworn to before me
this 6 day of December, 1982.

/s/ Lillian M. Schultz

Notary Public, State of New York

My Commission: 3/30/83

LILLIAN M. SCHULTZ
Notary Public, State of New York
No. 0632300
Qualified in Kings County
Commission Expires March 30, 1983